No. 46116-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BIG BLUE CAPITAL PARTNERS OF WASHINGTON, LLC,

Appellant

v.

REGIONAL TRUSTEE SERVICES CORPORATION; SPECIALIZED LOAN SERVICING, LLC; and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR TERWIN MORTGAGE TRUST, 2005-4HE, ASSET BACKED-CERTIFICATES, SERIES 2005-4HE,

Respondents

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

RESPONDENTS SLS AND U.S. BANK'S ANSWERING BRIEF

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I. INTRODUCTION

Respondents Specialized Loan Servicing, LLC ("SLS") and U.S. Bank National Association, as Trustee for Terwin Mortgage Trust, 2005-4HE, Asset Backed-certificates, Series 2005-4HE ("U.S. Bank") (collectively, "Respondents") respectfully submit this Answering Brief in response to the Opening Brief submitted by Appellant Big Blue Capital Partners of Washington, LLC ("Big Blue").

This "wrongful foreclosure" lawsuit was brought by a business entity, not an individual. Big Blue is a real estate investor who purchased the fee interest in real property from the bankruptcy estate of borrower Dawne Delay ("Delay"). Big Blue, as Delay's successor, filed suit in Superior Court seeking to have the deed of trust declared invalid.

The trial court properly dismissed Big Blue's claims on summary judgment. U.S. Bank demonstrated, under well-established Washington law, that it was the holder of the indorsed-in-blank promissory note. As holder, U.S. Bank was the beneficiary of the deed of trust and had authority to foreclose in the face of Delay's default.

Big Blue attempts to raise a series of red herrings to try to undermine the certainty of U.S. Bank's holder status, but the undisputed facts clearly demonstrate U.S. Bank was the note holder and deed of trust

beneficiary. Thus, the trial court correctly dismissed Big Blue's claims and the summary judgment order should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

The following issues are presented on this appeal:

1. Has Big Blue waived its right to seek declaratory and injunctive relief? Yes, Big Blue waived this right by failing to pay the bond set by the trial court to restrain the foreclosure sale.

2. Did U.S. Bank have authority to foreclose Delay's deed of trust? Yes, U.S. Bank had authority because it held the indorsed-in-blank note that memorialized Delay's loan.

3. Did RTS have authority to conduct the foreclosure sale as trustee? Yes, RTS had authority because it was appointed by U.S. Bank, the beneficiary of the deed of trust.

4. Do Big Blue's assignments of error have legal merit? No, each of Big Blue's assignments of error either fails as a matter of law and/or is unsupported by the admissible evidence in the record.

5. Are Respondents entitled to attorney fees on appeal? Yes, the deed of trust provides for an award of attorney fees to the prevailing party.

III. COUNTERSTATEMENT OF THE CASE

For ease of reference, Respondents present the factual background of this dispute in timeline format.

December 3, 2004: Delay borrowed $289,780.00 ("Loan") to finance the purchase of a rental property commonly known as 5714 Pattison Lake Drive Southeast, Lacey, Washington 98513 ("Property").[1]

The Loan was memorialized by a note ("Note") and deed of trust ("DOT"). Both the Note and DOT list the original lender of the Loan as "Apreva Inc., a Washington Corporation."[2] For the purpose of summary judgment, Respondents concede that there was no such Washington corporation called "Apreva Inc." Rather, Apreva was a Utah corporation.[3]

January 19, 2005: U.S. Bank acquired physical possession of the Note, which had been indorsed-in-blank by Apreva.[4] U.S.

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[1] Complaint (Compl.), Ex. I at 1.
[2] Note, CP 469; DOT, CP 474.
[3] *See* Op. Br. P. 18
[4] Note, CP 471; Robinson Decl. ¶ 3, CP 465.

Bank maintained possession through Deutsche Bank, its document custodian.[5]

March 1, 2005: SLS began servicing the Loan on behalf of U.S. Bank.[6]

June 28, 2012: Following her default on the Note, Delay filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code ("the Delay Bankruptcy") in the United States Bankruptcy Court for the District of Oregon on June 28, 2012.[7] DeLay did not claim the Property as exempt; she confirmed her intent to abandon it.[8]

August 9, 2012: Amy Mitchell, the appointed Chapter 7 trustee for the Bankruptcy Case, filed a Motion and Notice of Intent to Settle and Compromise, and Order Thereon ("Motion to Settle"), seeking authorization to "transfer the Estate's interest in [four parcels of real property] 'as is, where is' and subject to all liens and interests …" in exchange for payment of

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[5] Robinson Decl. ¶ 3, CP 465.
[6] *Id.* at ¶ 4, CP 465.
[7] *In re: Dawne Ellen DeLay*, U.S. Bankruptcy Court for the District of Oregon, Case No. 12-35073-ELP7.
[8] CP 223-24 at Nos. 11-12.

$20,000. Yates Decl. ISO Intervention, Ex. B. The parcels the Chapter 7 trustee proposed to "transfer" to Big Blue included the Property. *Id.*

December 12, 2012: Big Blue recorded a "Trustee's Deed" under which the Chapter 7 trustee deeded Big Blue the Property "subject to all existing encumbrances."[9] This document also stated that the transfer was "of the Bankruptcy Estate's interest, if any, in the subject property . . . as is, where is, without any warranties express or implied."[10] On the same day, SLS obtained relief from the automatic bankruptcy stay to pursue foreclosure proceedings against the Property.[11]

May 30, 2013: U.S. Bank, through SLS, recorded an Appointment of Successor Trustee appointing RTS as successor trustee of the DOT.[12]

August 5, 2013: U.S. Bank, through SLS, recorded a second appointment of RTS.[13]

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[9] Trustee's Deed, CP 55
[10] *Id.*
[11] Relief From Stay, CP 305-7.
[12] May 2013 Appointment, CP 496
[13] Aug. 2013 Appointment, CP 499.

August 9, 2013: RTS recorded a Notice of Trustee's Sale ("Notice of Sale") which set an original sale date of November 8, 2013.[14]

November 1, 2013: Big Blue filed this action against RTS only.[15]

November 22, 2013: The trial court temporarily enjoined the foreclosure sale and granted SLS and U.S. Bank leave to intervene in the case.[16] As a condition of and in order to maintain the order enjoining the sale, the Court required Big Blue to post a $200,000 bond by December 3, 2013, or the order would dissolve.[17] Big Blue never posted the bond.[18] Additionally, the Court ordered Big Blue to submit an order continuing the injunction and make the requisite monthly mortgage payment into the court registry.[19]

November 27, 2013: Counsel for SLS and U.S. Bank informed counsel for Big Blue that the correct monthly payment

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[14] Notice of Sale, CP 89.
[15] Compl., CP 7
[16] Order Granting Motion to Intervene; CP 442
[17] Order Granting Motion for Preliminary Injunction, CP 446.
[18] Yates Decl. ¶ 5, CP 504.
[19] Order Granting Motion for Preliminary Injunction, CP 446.

amount was $2,827.72.[20] Big Blue never made the monthly payment.[21]

December 27, 2013: RTS sold the Property at a non-judicial foreclosure sale – U.S. Bank took title to the Property as grantee of the Deed of Trust.[22]

February 19, 2014: Big Blue filed an amended complaint two days before Respondents scheduled summary judgment hearing.[23]

February 21, 2014: The trial court dismissed all defendants on summary judgment.[24]

March 19, 2014: The trial court denied Big Blue's motion for reconsideration.[25]

April 9, 2014: Big Blue timely filed this notice of appeal.[26]

IV. STANDARD OF REVIEW

The standard of review for a motion for summary judgment is *de novo* review. *Djigal v. Quality Loan Serv. Corp. of Washington, Inc.*, 196 Wn. App. 1038 (2016) (affirming summary judgment dismissal of

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[20] Yates Decl. ¶ 4, CP 504.
[21] *Id.* at ¶ 5.
[22] Amended Compl. ¶ 2.16.1-2-16.4, CP 832.
[23] Amended Compl., CP 550.
[24] Order Granting MSJ, CP 702
[25] Order Denying MFR, CP 873.
[26] Notice of Appeal, CP 874.

"wrongful foreclosure" claim.). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

A defendant who moves for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once that burden is met, the burden shifts to the party with the burden of proof at trial to "'make a showing sufficient to establish the existence of an element essential to that party's case.'" *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In demonstrating the existence of material facts, the nonmoving party may not rely on "mere allegations ..., but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." CR 56(e). The court reviewing a motion for summary judgment must draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Here, the undisputed facts show that U.S. Bank was the holder of the Note at all relevant times. Thus, U.S. Bank had authority to foreclose and Big Blue's claims to the contrary fail as a matter of law.

V. ARGUMENT

A. Big Blue's Injunctive and Declaratory Relief Claims are Barred by Waiver Under *Frizzell v. Murray*.

In its Amended Complaint, Big Blue sought declaratory relief that the DOT was void *ab initio* because it referenced Apreva as a Washington corporation instead of a Utah corporation.[27] Presumably included in this relief was a claim to unwind the trustee's sale of the Property conducted by RTS on December 27, 2013, and to recover title to the Property. However, this claim is barred by *Frizzell v. Murray*, 179 Wn.2d 301, 307, 313 P.3d 1171 (2013).

Absent extraordinary circumstances, failure to enjoin a trustee's sale constitutes waiver of the right to unwind the sale after it has occurred. *Frizzell v. Murray*, 179 Wn.2d 301, 307, 313 P.3d 1171 (2013); RCW 61.24.127(2). Waiver occurs where "a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to

[27] Am. Compl., ¶ 1, CP 605

obtain a court order enjoining the sale." *Id.* at 306 (citing *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

All elements of waiver are met here. Big Blue had notice of its right to enjoin the sale and knew of its defense before the sale – indeed, it brought a motion to enjoin the sale before it occurred.[28] Additionally, Big Blue failed to restrain the sale because it did not pay the injunction bond set by the trial court.[29]

This case is very similar to the *Frizzell* case in that in *Frizzell* the borrower was granted an injunction but failed to make the bond payment. 179 Wn.2d 305. The Court found that these circumstances led to waiver of any claim to contest the sale after the fact. *Id.* Thus, as in *Frizzell*, inability to pay is not a defense to the waiver doctrine. As in that case, waiver applies here and precludes Big Blue from challenging the trustee's sale or clouding title to the Property.

B. The Undisputed Evidence Established U.S. Bank's Authority to Foreclose.

RCW 61.24, the Washington Deed of Trust Act ("DTA"), defines "beneficiary" as the "holder" of the obligation secured by the Deed of Trust. RCW 61.24.005(2). The UCC defines the "[h]older" of a negotiable instrument in relevant part as "the person in possession if the

[28] Motion for Injunction, CP 260.
[29] Yates Decl. ¶ 5, CP 504.

instrument is payable to bearer." RCW 62A.1-201(21)(A). A negotiable instrument is payable to bearer if, as is the case with the Note here, it is indorsed in blank. *See* RCW 62.A.3-205(b).

The Washington Supreme Court has confirmed that the relevant inquiry when determining a deed of trust beneficiary is the holder of the note, not the owner:

> Under the UCC, promissory notes embrace two sets of rights. The first set of rights is held by the "person entitled to enforce" the note, a legal term of art commonly referred to as "PETE" status. See RCW 62A.3–301 (definition). The second set of rights is ownership of the note. The owner has the right to the economic benefits of the note, such as monthly mortgage payments and foreclosure proceeds. The PETE and the owner of the note can be the same entity, but they can also be different entities.

Brown v. Washington State Dep't of Commerce, 184 Wn.2d 509, 524, 359 P.3d 771, 2015 WL 6388153 (2015).

When the PETE and the owner are different entities, the following rules apply:

> [T]he borrower owes and discharges his or her obligation to the PETE. The PETE enforces and modifies the note. This relationship remains the case even though the [PETE] is not the owner of the instrument. RCW 62A.3–301. The PETE's possession of the note provides the borrower with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged.

Id. at 779 (internal quotations omitted).

In determining beneficiary status – that is, the party entitled to enforce the power of sale in the deed of trust – courts must look to the PETE/holder of the note. *Id.* at 789.

Here, the undisputed evidence shows that U.S. Bank has possessed the indorsed-in-blank Note through its document custodian Deutshce Bank since at least January 19, 2005.[30]

Thus, under established Washington law, U.S. Bank has been the holder of the Note and beneficiary of the Deed of Trust since January 19, 2005. RCW 62A.1-01(21)(A); *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012). This evidence establishes a prima facie case of U.S. Bank's authority to foreclose.

C. The Undisputed Evidence Established RTS' Authority to Act as Successor Trustee.

The DTA provides that "[t]he trustee may resign at its own election or be replaced by the beneficiary." RCW 61.24.010; *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 305-6, 308 P.3d 716 (2013) (only lawful beneficiary may appoint successor trustee); *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 488, 309 P.3d 636 (2013) (same).

[30] Note, CP 471; Robinson Decl. ¶ 3, CP 465.

Here, U.S. Bank appointed RTS as successor trustee of the DOT via recorded appointments on both May 30 and August 5, 2013.[31] Respondents have already established that U.S. Bank was beneficiary of the DOT since January 19, 2005. Thus, its appointment of RTS as successor trustee was proper. *Walker*, 176 Wn. App. at 305-6; *Bavand*, 176 Wn. App. at 488.

The evidence cited in §§ V.B-C above establishes that U.S. Bank had authority to foreclose as a matter of law. Big Blue did not come forward with admissible evidence that raised a genuine issue of material fact as to U.S. Bank's authority to appoint RTS and none of Big Blue's assignments of error have merit. Thus, the trial court properly granted summary judgment to U.S. Bank and SLS.

D. Big Blue's Assignments of Error Related to U.S. Bank's Authority to Foreclose are Without Merit.

In the preceding sections, Respondents have established their authority to foreclose as a matter of law. Now, Respondents turn to each of Big Blue's assignments of error and demonstrate why Big Blue's arguments fail to support a case for reversal of the summary judgment order.

[31] May 2013 Appointment, CP 496; Aug. 2013 Appointment, CP 499.

1. The Corporate Citizenship of Apreva is Not a Genuine Issue of Material Fact.

Big Blue's first assignment of error relates to the corporate citizenship of Apreva, the original lender. Big Blue argues that the Note was payable to "Apreva Inc., a Washington corporation" and that entity did not exist at the time the instrument was made.[32] Likewise, Big Blue contends that "Apreva Inc., a Washington corporation" did not have capacity to act as grantee of the DOT.[33] Based on these allegations, Big Blue argues that the DOT was unenforceable and title to the Property should have been quieted in its favor.[34]

This argument fails as a matter of law.

The Note that Delay made is a "negotiable instrument" within the meaning of the Uniform Commercial Code as adopted in Washington (UCC). *See* RCW 62A.3-104; *and see Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 328, 387 P.3d 1139, 1144 (2016) (even note with negatively amortizing principal is "negotiable instrument" under Washington law.). The UCC has a specific provision, RCW 62A.3-110, entitled "Identification of person to whom instrument is payable," which applies to the situation in this case. Under RCW 62A.3-110(a), "[t]he instrument is payable to the person intended by the signer even if that

[32] Op. Br. P. 18.
[33] *Id.*
[34] *Id.* at p. 24.

person is identified in the instrument by a name or other identification that is not that of the intended person."

In other words, because there is no dispute that the original borrower intended to borrow money from Apreva and make a note payable to the party that loaned her money, the Note was originally payable to the correct Apreva entity even if it was non-prejudicially misdescribed as a Washington, rather than Utah, company. *See also* RCW 62A.3-110, Cmt. 1 (noting issue usually arises in a dispute over the validity of an indorsement in the name of the payee). The comment to Section 3-110 goes on to state that the "same issue is presented in cases of misdescriptions of the payee," and gives the following example:

> The drawer intends to pay a person known to the drawer as John Smith. In fact that person's name is James Smith or John Jones or some other entirely different name. If the check identifies the payee as John Smith, it is nevertheless payable to the person intended by the drawer.

RCW 62A.3-110, Cmt. 1.

Applying the UCC here ends with a fair and just result. There is no dispute that Apreva (regardless of where it was incorporated) loaned Delay money and that Delay intended to make the Note to memorialize her promise to repay the Loan. There is also no dispute that Apreva (again regardless of where it was incorporated) transferred the Loan to U.S. Bank

by indorsing the Note and relinquishing possession to U.S. Bank.[35] Under RCW 62A.3-110, this factual pattern results in a valid and enforceable note and directly rebuts Big Blue's theory of the case.

In spite of the common sense approach offered by the UCC, Big Blue attempts to argue that the Note and DOT are unenforceable under the statute of frauds.[36] In support of this argument, Big Blue relies on *White v. Dvorak*, 78 Wn. App. 105, 110, 896 P.2d 85, 88 (1995).

Big Blue's reliance on *White* fails on several grounds. **First**, *White* involved a corporation that had existed at one time but had administratively dissolved before the subject contract was signed. *White*, 78. Wn. App. 108. The evidence here is that Apreva was a real corporation at the time of the Loan transaction, only it was a Utah corporation instead of a Washington corporation.[37] Thus, *White* is distinguishable on the facts.

Second, Big Blue cites dicta from *White* but ignores its holding – the contract in *White* was held to be enforceable against the defendants. *Id.* at 115. Therefore, the ***holding*** of *White* supports a finding of enforceability.

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[35] Note, CP 471; Robinson Decl. ¶ 3, CP 465.
[36] Op. Br. 22.
[37] *See* Op. Br. P. 18

Third is the issue of waiver. Big Blue's evidence regarding the corporate citizenship of Apreva was taken from the publicly available Washington Secretary of State records.[38] This information would necessarily have been available on December 12, 2012, when Big Blue recorded the "Trustee's Deed" that transferred to it Delay's interest in the Property.[39] However, it is undisputed that, through the Trustee's Deed, Big Blue took title to the Property "subject to all existing encumbrances, ... Liens... of record[.]" This qualification would include the DOT, which was an encumbrance/lien of record at the time.[40]

"A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive." *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1, 6 (1998), as corrected (Feb. 20, 1998). Here, by taking title to the Property subject to liens and encumbrances of record, Big Blue waived its right to challenge the enforceability of the DOT.

The UCC directly rebuts Big Blue's argument regarding Apreva's corporate citizenship. RCW 62A.3-110, Cmt. 1. At most, the original lender's state of incorporation is a technical issue of fact. It is not an issue

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[38] CP 244.
[39] Trustee's Deed, CP 56.
[40] *Compare* DOT, CP 474 (recorded 12/9/04) with Trustee's Deed, CP 56-57 (recorded 12/12/12).

of ***material*** fact sufficient to warrant reversal of the trial court's summary judgment order.

2. Respondents' Summary Judgment Evidence Was Admissible.

Big Blue also argues that the trial court erred by considering the declarations submitted by SLS officers Cynthia Wallace and Hunter Robinson.[41] However, these declarations are admissible.

First, as an initial matter, the Court did not rely on the Wallace Declaration in entering summary judgment in favor of Respondents.[42] Accordingly, it is inappropriate to assign error based on supposed problems with the Wallace Declaration. *See* CR 56(h) ("The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.").

Second, Big Blue contends that the declarations are contradictory. Big Blue's basis for this contention are (1) that a copy of the Note attached in Delay's bankruptcy did not have an indorsement whereas the copy of the Note Respondents submitted on summary judgment did have an

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[41] Op. Br. 24.
[42] *See* MSJ Order, ER 701-702.

indorsement; and (2) that the loan number referenced in Mr. Robinson's declaration is different than the loan number on the Note.[43]

Big Blue's allegations regarding "contradictions" are red herrings. It is undisputed that Apreva originated the Loan and that U.S. Bank subsequently acquired the Loan (though Big Blue disputes this transfer was effective).[44] This fact pattern is completely consistent with the Note having no indorsement at the time of origination and later acquiring an indorsement when it was transferred to U.S. Bank. Indeed, the entire concept of negotiable instruments presumes that notes will acquire indorsements as they are negotiated. Thus, there is no evidence of different versions of the Note or multiple notes, there are simply multiple copies reflecting that the indorsement was made after the Note was originally signed. Tellingly, Big Blue does not dispute that Delay signed the original Note and borrowed money nor does Big Blue assert that the substantive terms of the "versions" are different.

The difference in loan numbers is also completely consistent with the present fact pattern. Apreva originated the Loan and assigned it a loan number. When SLS began servicing the loan, it assigned the loan its own loan number. Thus, Big Blue's arguments regarding contradictory declarations fails to raise an issue of fact that is material or genuine.

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[43] *Id.* (citing CP 516-518, 521-523).
[44] Op. Br. pp. 3-5.

Third, Big Blue contends that the statements in the Wallace and Robinson declarations are not business records because they rely on records created by other entities.[45] This argument ignores the current state of Washington law on the topic – business records created by other entities are admissible where they are regularly relied upon in the course of business. *See Nilsen v. Quality Loan Servicing Corp. of Wn.*, 193 Wn. App. 1010 (2016) (upholding reliance on business records created by prior servicer).

Here, Mr. Robinson testified that he was doing so

> on the basis of personal knowledge and on the basis of the review of records regularly kept by SLS in the course of its business with which I am personally familiar. I am also familiar with the identity of SLS' records relating to the Loan (defined in Paragraph 2 below) and the mode of their preparation.[46]

This sworn statement is prima facie proof of the authenticity of the business records and Mr. Robinson's competency to testify about them. If Big Blue suspected that Mr. Robinson's statement was untruthful or incomplete, it should have taken his deposition. Without actual evidence though, mere allegations or theories about Mr. Robinson's supposed lack of knowledge are insufficient to defeat summary judgment.

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[45] Op. Br. 24-25.
[46] Robinson Decl. ¶ 1, CP 464.

Big Blue relies on *Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010) in support of its hearsay argument.[47] However, the *Nilsen* case (cited above) directly relied on *Discover* in holding that business records of a prior or affiliated entity are admissible). *Nilsen*, 193 Wn. App. 1010, n. 26.

Fourth, Big Blue cannot base its assignments of error on the fact that U.S. Bank employed a document custodian to maintain possession of the Note. In the *Bain* case, the Washington Supreme Court explicitly condoned a beneficiary's use of agents to fulfill its statutory duties. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106, 285 P.3d 34, 45 (2012) ("nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents."); *Barton v. JPMorgan Chase Bank*, N.A., No. C13-0808RSL, 2013 WL 5574429, at *1 (W.D. Wash. Oct. 9, 2013) ("Original promissory notes are bearer paper: the holder of the note has the right to collect payments thereunder according to its terms. It is hardly surprising that original notes are not bandied about or otherwise put at risk of loss or destruction.").

In the end, the Robinson declaration is perfectly consistent with the other evidence Respondents submitted in support of their motion for

[47] Op. Br. 25

summary judgment. That declaration was further based on business records regularly relied upon in the course of business. As such, the Robinson Declaration was admissible and relying upon it was no error.

3. The Trial Court Properly Dismissed Big Blue's CPA Claim.

Big Blue's next assignment of error contends that the trial court erred in dismissing its Consumer Protection Act ("CPA") claim pursuant to *Frizzell* because CPA claims are not waived by failure to obtain an injunction.[48] Respondents agree that the CPA claim survives the sale.

However, the CPA claim fails because Big Blue's core theory of the case – the DOT is unenforceable – fails as a matter of law. Indeed, this is exactly what Respondents argued to the trial court in their Motion for Summary Judgment.[49]

To prevail on a CPA action, a plaintiff must show "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

In their brief, Big Blue argues that the trial court should have considered the CPA claims alleged in their Amended Complaint.

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[48] Op. Br. P. 26.
[49] MSJ, CP 458-460.

However, Big Blue does not cite to any sworn statement that is admissible to prove each element of the CPA claim.[50] While Big Blue's allegations of misconduct might be sufficient to survive the pleading stage, motion for summary judgment must be opposed with sworn testimony. CR 56(c). Failing to cite to such sworn testimony, Big Blue cannot hope to rehabilitate its dismissed CPA claim. *Bain*, 175 Wn.2d at 119 (even establishing a deceptive act or practice, a plaintiff must still prove each element of her CPA claim).

4. The Allegations in the Amended Complaint are Insufficient to Defeat Summary Judgment.

Big Blue's next assignment of error contends that the trial court erred in dismissing the lawsuit despite the fact that it filed an Amended Complaint two days before the summary judgment hearing.[51]

Filing an amended complaint, even if done as matter of right, after the briefing on SLS and U.S. Bank's motion for summary judgment had closed, is an improper tactic that should not be rewarded. *See, e.g., Kirby v. City of Tacoma*, 124 Wn. App. 454, 472-473, 98 P.3d 827 (2004) ("a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment") (internal quotation omitted); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 675, 303

[50] Op. Br. p. 27 (citing CP 28, CP 238, CP 98-107; CP 601-604).
[51] Op. Br. pp. 27-31.

P.3d 1065 (2013) (upholding denial of plaintiff's motion to amend in Deed of Trust Act case as futile and untimely where motion to amend filed with opposition to summary judgment motion).

Moreover, the claims as alleged in the Amended Complaint rest on the same underlying, fatally flawed legal theories as the original complaint: the Amended Complaint simply reflects SLS and U.S. Bank's intervention and the fact that the real property at issue had been sold following Big Blue's failure to comply with the terms of the Court's injunction order. As such, if Big Blue is correct that it was allowed to amend its Complaint as a matter of right, then the result is that the trial court's summary judgment ruling had the effect of dismissing it. This result is permitted under CR 15(b), which provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

CR 15(b). Thus, a trial court has the discretion to amend the pleadings to confirm the evidence at any stage of the case, even after judgment. *Mukilteo Retirement Apts., L.L.C. v. Mukilteo Investors, L.P.*, 176 Wn. App. 244, 255, 310 P.3d 814 (2013). An underlying purpose of subsection

(b) of Rule 15 is to avoid a multiplicity of suits between the same parties arising out of the same transaction. *O'Kelley v. Sali*, 67 Wn.2d 296, 298-299, 407 P.2d 467 (1965). Here, SLS and U.S. Bank were fully apprised of the nature of Big Blue's claims and litigated the summary judgment motion as intervenor-parties to the case, just as they would have had the Amended Complaint been filed prior the close of summary judgment briefing. The eleventh-hour filing of the Amended Complaint should not have any bearing on the outcome of the case.

5. Where Respondents Have Made a Prima Facie Case For U.S. Bank's Holder/Beneficiary Status, Big Blue is Not Entitled to Inferences Based on Unsupported Allegations.

The final section of Big Blue's substantive argument lists five inferences that it claims the trial court failed to make in its favor.[52] Each of these "inferences" relates to the enforceability of the Note and DOT and U.S. Bank's authority to foreclose.[53]

In § V.B-C, above, Respondents showed that the admissible evidence before the trial court established U.S Bank's holder status and thus, its authority to foreclose. Having made this prima facie case, the duty fell on Big Blue to come forward with admissible evidence that raised a genuine issue of material fact to dispute these prima facie

[52] Op. Br. 31.
[53] *Id.*

showing. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Instead, Big Blue proposed mere allegations – that was not enough. "Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150, 154 (2011).

Respondents presented sworn testimony that U.S. Bank held the indorsed-in-blank Note at all relevant times through Deutsche Bank, its document custodian.[54] In response to this prima facie showing, Big Blue theorizes that, maybe the indorsement is fake, or maybe Deutsche Bank doesn't actually act as document custodian, etc. However, Big Blue's obligation at summary judgment was not simply to raise theories. Its obligation was to present admissible evidence in support of those theories. Big Blue did not present this evidence, and so the trial court properly granted summary judgment.

E. Respondents are Entitled to an Award of Attorney Fees on Appeal.

Respondents agree with Big Blue that the DOT contains an attorney fee provision that would provide for an award of attorney fees on

[54] Note, CP 471; Robinson Decl. ¶ 3, CP 465.

appeal.[55] Based on this provision, Respondents request that the Court award them the reasonable attorney fees and costs incurred in defending this appeal.

VI. CONCLUSION

Big Blue took an investment gamble that did not pay off. It purchased the Property out of bankruptcy for pennies on the dollar and then tried to gin up a quiet title action to get the Property free and clear. However, Delay borrowed the money, signed the Note and DOT, and U.S. Bank now possesses the indorsed-in-blank Note. These facts prove that U.S. Bank had authority to foreclose, and thus each of Big Blue's causes of action failed as a matter of law. The trial court correctly dismissed this case on summary judgment, and this Court should affirm.

RESPECTFULLY SUBMITTED this 10th day of April, 2017.

LANE POWELL PC

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[55] Op. Br. P. 32; DOT ¶ 26, CP 72.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 10th day of April, 2017, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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DATED this 10th day of April, 2017.

s/ Peter C. Elton
Peter C. Elton

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